

## SEPARATE OPINION OF JUDGE ROBINSON

*Failure of the Court to rule on the merits of the claim that Nicaragua breached the prohibition of the use of force set out in Article 2 (4) of the United Nations Charter — the centrality of that prohibition in the United Nations Charter system for the maintenance of international peace and security — the need for the Court to adopt a practice of ruling on the merits of a claim for a breach of Article 2 (4) of the United Nations Charter, unless the claim is patently unmeritorious or frivolous — the assumption that reparation for a breach of territorial sovereignty sufficiently addresses a breach of the prohibition of the use of force — international law envisages a spectrum of activities that may breach Article 2 (4) of the United Nations Charter — the finding that in this case a breach of Article 2 (4) of the United Nations Charter has been committed.*

1. As my votes indicate, I am in broad agreement with the Court's decision in this case. I write separately to explain my vote against the Court's rejection in paragraph 229 (7) of all other submissions made by the Parties.

2. In its final submissions, 2 (b) (ii), Costa Rica asked the Court to find a breach by Nicaragua of "the prohibition of the threat or use of force under Article 2 (4) of the United Nations Charter and Article 22 of the Charter of the Organisation of American States"<sup>1</sup>. In its earlier submissions, Costa Rica also asked the Court to find Nicaragua responsible for its violation of the prohibition of the threat or use of force pursuant to Article 2 (4) of the United Nations Charter, and Articles 1, 19, 21, 22 and 29 of the Charter of the Organization of American States<sup>2</sup>.

3. I am of the opinion that the facts establish Nicaragua's breach of Article 2 (4) of the United Nations Charter and that in the circumstances of this case the Court should have separately and explicitly determined the claim that there was a breach of that provision. The opinion also argues that the Court should adopt a practice of determining the merits of a claim that Article 2 (4) of the United Nations Charter has been breached, unless the claim is patently unmeritorious or frivolous. In this opinion, I also explain my hesitations regarding what appears to be the Court's finding that, in this case, reparation awarded for a breach of territorial sovereignty would sufficiently address the injury suffered as a result of any potential breach of Article 2 (4).

4. This opinion is divided as follows:

- A. The Court's approach
- B. The background
- C. The need for the Court to determine the merits of a claim that there is a breach of Article 2 (4) of the United Nations Charter
- D. Interpreting paragraph 97
- E. The determination of a breach of Article 2 (4) of the United Nations Charter

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<sup>1</sup>CR 2015/14, p. 68, para. 2 (b) (ii); see paragraph 97 of the Judgment.

<sup>2</sup>Memorial of Costa Rica (MCR), Submissions, p. 303, para. 1 (b) (invoking Art. 2 (4) of the UN Charter and Art. 1, 19, 21 and 29 of the OAS Charter); CR 2015/14, p. 68, para. 2 (b) (ii) (invoking Art. 2 (4) of the UN Charter and Art. 22 of the OAS Charter).

(i) The gravity of Nicaragua's actions

(ii) Purpose

G. Conclusion

#### A. THE COURT'S APPROACH

5. In ruling on Costa Rica's submissions about the prohibition of the threat or use of force, the Court states the following in paragraph 97:

“The fact that Nicaragua considered that its activities were taking place on its own territory does not exclude the possibility of characterizing them as unlawful use of force. This raises the issue of their compatibility with both the United Nations Charter and the Charter of the Organization of American States. However, in the circumstances, given that the unlawful character of these activities has already been established, the Court need not dwell any further on this submission. As in the case concerning *Land and the Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, the Court finds that, ‘by the very fact of the present Judgment and the evacuation’ of the disputed territory, the injury suffered by Costa Rica ‘will in all events have been sufficiently addressed’ (*I.C.J. Reports 2002*, p. 452, para. 319).”

6. In doing so, the Court follows its approach in *Land and Maritime Boundary (Cameroon v. Nigeria)*. In that case, Cameroon had asked the Court to adjudge and declare that by “invading and occupying its territory”, Nigeria had violated its conventional and customary obligations; in particular, the prohibition of the use of force, the principle of non-intervention and Cameroon's territorial sovereignty<sup>3</sup>. Cameroon argued that Nigeria was under an obligation to end its presence in Cameroonian territory, evacuate any occupied areas, refrain from such acts in future, and to make reparation for material and non-material injury<sup>4</sup>. Given the unsettled nature of the boundary, Nigeria argued that it believed its actions were lawful<sup>5</sup>.

7. The evidence shows that the acts pleaded by Cameroon included at least 80 incidents<sup>6</sup>, some of them resulting in loss of life<sup>7</sup> due to active engagements between Cameroonian and Nigerian military forces on Cameroonian territory and arrests by military forces. The alleged acts

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<sup>3</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *I.C.J. Reports 2002*, p. 450, para. 310.

<sup>4</sup>*Ibid.*

<sup>5</sup>*Ibid.*, p. 451, para. 311.

<sup>6</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Memorial of Cameroon, pp. 564-595; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Observations by the Republic of Cameroon on the Preliminary Objections of Nigeria, Book II (C.O. Ann. 1); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Counter-Memorial of Nigeria, May 1999, pp. 653-800.

<sup>7</sup>While there appears to have been disagreement between the Parties about the number of persons killed, it is clear that lives were lost. For example, Cameroon and Nigeria appear to agree on the fact that during the military exchange between the two countries on 16 May 1981, some Nigerian soldiers died — Reply of Cameroon, p. 505, para. 11.58; Memorial of Cameroon, pp. 567-569, paras. 6.12-6.27; in relation to an exchange of fire between the two countries on 3 February 1996, Nigeria states in its Rejoinder “thus what Cameroon presents as a carefully prepared surprise attack by Nigeria killed or wounded 30 Nigerian civilians” — Rejoinder of Nigeria, Part V, State Responsibility and Counterclaims, Chap. 16, Appendix, para. 160.

had taken place over a 15-year period and the large majority occurred on parts of the territory that were in dispute<sup>8</sup>.

8. The Court found that, in light of its decision on the boundary between the two States, Nigeria was under an obligation to withdraw its civilian and military presence from occupied areas that the Court had found to belong to Cameroon<sup>9</sup>. The Court did not explicitly adjudicate Cameroon's claims of breach of the prohibition of the use of force<sup>10</sup>, holding that:

“In the circumstances of the case, the Court considers moreover that, by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation.”<sup>11</sup>

9. The Court went on to decide that, in respect of “various boundary incidences” alleged by both Parties to breach the other Party's international obligations, neither Party had proved their case<sup>12</sup>.

## B. THE BACKGROUND

10. The Judgment does not set out in detail the facts which substantiate Costa Rica's claim of a breach of Article 2 (4) of the United Nations Charter. The treatment of this issue is very sparse, being confined to: (i) paragraphs 66 and 67, which mention Nicaragua's placement of military units in the area of Isla Portillos with the indication that the matter would be considered in relation to Nicaragua's compliance with the Court's Order on provisional measures, of 8 March 2011; (ii) paragraph 93, where the Court finds that Nicaragua's activities were a breach of Costa Rica's territorial sovereignty; (iii) paragraph 97, in which the Court finds that the injury suffered by Costa Rica will in all events have been sufficiently addressed; (iv) paragraphs 121 to 129, which address the question of Nicaragua's compliance with provisional measures; and (v) paragraph 139 and 142, in which the Court deals with reparation for certain activities by Nicaragua, are also relevant to the discussion.

11. These paragraphs have to be read along with relevant passages from the pleadings of the Parties. The Court has held, in paragraph 67 of the Judgment, that violations that occurred in 2013, although taking place after Costa Rica's Application was filed, may be examined “as part of the merits of the claim” since “they concern facts which are of the same nature as those covered in the Application and which the Parties had the opportunity to discuss in their pleadings”. As such, they are considered in this opinion.

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<sup>8</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Memorial of Cameroon, pp. 564-595; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Observations by the Republic of Cameroon on the Preliminary Objections of Nigeria, Book II (C.O. Ann. 1); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Counter-Memorial of Nigeria, May 1999, pp. 653-800.

<sup>9</sup>*Ibid.*, p. 451, para. 314.

<sup>10</sup>Christine Gray, “The International Court of Justice and the Use of Force” in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), p. 237 (fn. 7).

<sup>11</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, I.C.J. Reports 2002, p. 452, para. 319.

<sup>12</sup>*Ibid.*, paras. 323-324.

12. Nicaragua and Costa Rica have a history of an at times difficult and fractious relationship. In 1857, one year before the adoption of the Treaty of Limits, there were hostilities between the two countries. During the well-known period of conflict between the Sandinista government in Nicaragua and the Contras in the 1980s, some of the Contras operated from camps established in Costa Rica.

13. On 31 October 2010, Costa Rica became aware that the Costa Rican flag at Finca Aragón had been removed, and noticed Nicaraguan military camps in that area<sup>13</sup>. On 1 November 2010, Costa Rica noticed the presence of Nicaraguan personnel close to the first *caño* during an overflight of the area of Finca Aragón in Costa Rica<sup>14</sup>. During this overflight Nicaraguan personnel pointed AK-47s, and one soldier appears to be pointing an anti-aircraft type missile, at the the Costa Rican aircraft<sup>15</sup>. On the same day, the Costa Rican Foreign Minister sent a note to the Minister for Foreign Affairs of Nicaragua protesting the presence of the military personnel<sup>16</sup>.

14. Costa Rica further raised the situation with the Organization of American States (OAS) on 3 November, but efforts to find a consensual solution failed. On 12 November 2010, the Permanent Council of the OAS, by a majority of 22 votes in favour, with two votes against (Nicaragua and Venezuela) and three abstentions, adopted the OAS Secretary-General's recommendation to demilitarize the area of Isla Portillos<sup>17</sup>.

15. In a speech on the following day, Nicaraguan President Daniel Ortega denied the propriety of the OAS vote, asserting that Costa Rica was occupying and attempting to take possession of Nicaraguan territory to the north east of the first *caño*<sup>18</sup>.

16. On 18 November 2010, Costa Rica decided to file the Application for the *Certain Activities* proceedings and at the same time requested the Court to indicate provisional measures of protection<sup>19</sup>.

17. On 7 December 2010, Special Adviser to the OAS Secretary-General, Ambassador Caputo, after conducting an overflight, reported to the OAS that he "saw no members

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<sup>13</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, I.C.J. Reports 2002, p. 452, paras. 323-324; MCR, p. 74, para. 3.18.

<sup>14</sup>CR 2011/1, p. 30, para. 24.

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*, para. 25.

<sup>17</sup>CP/RES. 978 (1777/10) Situation in the Border Area Between Costa Rica and Nicaragua (12 Nov. 2010), available at <http://www.oas.org/council/resolutions/res978.asp>; see also, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 10, para. 16.

<sup>18</sup>Application of Costa Rica, Attachment 6, p. 70, Speech by President-Commander Daniel Ortega, Defending the Sovereign Right of the Nicaraguan People over the San Juan River (English translation), 13 Nov. 2010, 19:25, p. 88 ("We as the harmed party [of the case], because we are being harmed by Costa Rica, will have recourse to the Court and denounce Costa Rica for wanting to occupy Nicaraguan territory, because this is what Costa Rica wants! To take possession of Nicaraguan territory"); *ibid.*, p. 76 ("Then there is the area they called Isla Portillos, as well; and then there is this area where we have the lagoon and the channel where we are working on, and here, we are already in Nicaraguan territory. In Costa Rican territory, we have neither occupied Isla Calero, that is not true! Nor occupied what they call Isla Portillos . . . there are no soldiers or police there").

<sup>19</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011 (I), I.C.J. Reports 2011, p. 9, para. 11.

of the armed forces on the ground”, but went on to say that this “does not necessarily mean that there were none. In contrast, the military presence on board the dredger was obvious.”<sup>20</sup>

18. During the Court’s January 2011 hearings for Costa Rica’s request for the indication of provisional measures, Costa Rica presented evidence that the Nicaraguan military presence in the disputed territory had increased<sup>21</sup>. In this context, counsel for Costa Rica also made reference to alleged Nicaraguan violations of Costa Rica’s territorial waters in the Caribbean Sea and “underline[d] that the inhabitants of the region are extremely worried and scared”<sup>22</sup>.

19. During its oral pleadings before the Court on 11 January 2011, Nicaragua stated that “there are no troops in the swampland. There is no permanent military post in the area.”<sup>23</sup>

20. On 19 January 2011, a Costa Rican overflight established that Nicaraguan military personnel continued to be present on the disputed territory and that the size of their encampment had increased since October 2010<sup>24</sup>.

21. The Court, in its Order for provisional measures of 8 March 2011, required both Parties to “refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security”<sup>25</sup>.

22. However, about two years later, in a photograph dated 5 February 2013 and submitted to the Court on 15 March 2013, a new military camp was visible on the beach<sup>26</sup>. On 18 September 2013, a Costa Rican overflight provided further evidence of the Nicaraguan military troops and camps on the beach within the disputed territory<sup>27</sup>.

23. During Nicaragua’s oral pleadings on 15 and 17 October 2013 in response to Costa Rica’s request for new provisional measures, Nicaragua claimed that Costa Rica had been aware of the “Nicaraguan military detachment” for almost two years and that its purpose was to fight drug trafficking<sup>28</sup>. Nicaragua also pointed out that in its request for new provisional measures, Costa Rica did not, again, complain about Nicaraguan military presence<sup>29</sup>.

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<sup>20</sup>Report of the OAS Secretary General, Pursuant to Resolution CP/Res. 979 (1780/10), presented to the Twenty-Sixth Meeting of Consultation of Ministers of Foreign Affairs, 7 Dec. 2010, cited in CR 2011/1, pp. 33-34, para. 36.

<sup>21</sup>CR 2011/1, p. 35, para. 46.

<sup>22</sup>CR 2011/1, p. 35, para. 47.

<sup>23</sup>CR 2011/2, p. 13, para. 28.

<sup>24</sup>Memorial of Costa Rica, p. 93, para. 3.53, citing Memorial of Costa Rica, Vol. 5, Ann. 223.

<sup>25</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 27, para. 86 (1).

<sup>26</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013, p. 365, para. 46.

<sup>27</sup>CR 2013/24, p. 21, para. 18.

<sup>28</sup>CR 2013/27, p. 16, para. 35.

<sup>29</sup>CR 2013/27, p. 17, para. 36.

24. In its Order for provisional measures of 22 November 2013, the Court found that the photograph dated 5 February 2015 did show a “Nicaraguan army encampment” and that “military personnel” had been stationed there since at least 5 February 2013<sup>30</sup>. The Court also held that the encampment was within the disputed territory<sup>31</sup>. In the Order’s operative paragraph the Court again explicitly required Nicaragua to remove, and consequently prevent from entering, any “civilian, police or security” personnel<sup>32</sup>.

25. In conclusion, the evidence before the Court establishes the presence of Nicaraguan military personnel from at least 1 November 2010 to 19 January 2011 on what the Court today has confirmed is Costa Rican territory. The Nicaraguan military was therefore on Costa Rican territory for just over eleven weeks in the years 2010-2011.

26. The evidence before the Court further establishes that from 5 February 2013 until sometime shortly before 22 November 2013, a period of nine months, Nicaragua had an established military presence on the beach, which is also, as confirmed by the Judgment, Costa Rican territory.

### **C. THE NEED FOR THE COURT TO DETERMINE THE MERITS OF A CLAIM THAT THERE IS A BREACH OF ARTICLE 2 (4) OF THE UNITED NATIONS CHARTER**

27. The prohibition of the threat or use of force is a foundational rule of the international legal system. It has been described by the Court as “a cornerstone of the United Nations Charter”<sup>33</sup>. The prohibition has been deemed to “represent . . . , beside the protection of human rights, ‘the major achievement of the international legal order in the 20th century . . . the cornerstone of that order and an undisputed core principle of the international community’”<sup>34</sup>.

28. Up to the end of World War I, and despite early twentieth century attempts to the contrary, international law did not prohibit the use of force among States. Significantly, the Covenant of the League of Nations did not contain a general prohibition on the use of force. Article 11 defined war and the threat of war as a “matter of concern to the whole League”, but only in specific circumstances were States prohibited from resorting to war<sup>35</sup>. It was only after Article 1 of the Kellogg-Briand Pact was adopted in 1928 that “recourse to war” was prohibited. It was renounced “as an instrument of national policy” by the majority of States<sup>36</sup>. It took the atrocities of World War II to convince States to agree on the prohibition of force in its modern form. It is found in Article 2, paragraph 4, of the Charter of the United Nations and reads as follows:

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<sup>30</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013, p. 365, para. 46.*

<sup>31</sup>*Ibid.*

<sup>32</sup>*Ibid.*, p. 369, para. 59 (2) (C).

<sup>33</sup>*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 223, para. 148.*

<sup>34</sup>Oliver Dörr, Albrecht Randelzhofer, Chapter I Purposes and Principles, Art. 2 (4), from: *The Charter of the United Nations: A Commentary*, Vol. I, 3rd ed., Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, eds., Nikolai Wessendorf, (Assistant Editor), Oxford University Press, 2012, para. 71.

<sup>35</sup>Arts. 11-13, Covenant of the League of Nations.

<sup>36</sup>The initial parties were Australia, Belgium, Canada, Czechoslovakia, France, Germany, British India, the Irish Free State, Italy, Japan, New Zealand, Poland, South Africa, the United Kingdom and the United States of America. Forty more States also adopted the Pact. A similar provision in the Saavedra Lamas Treaty applies to many of the Latin American States.

“The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

.....

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

29. The history of the prohibition of the use of force, and in particular, the difficulties encountered by the international community in arriving at agreement on the prohibition, is one indication of its pivotal role in the architecture established after World War II for the maintenance of international peace and security. The centrality of that role is no doubt one of the factors explaining why the prohibition has the status not only of a rule of customary international law, but also of a peremptory norm of general international law from which no derogation is permitted<sup>37</sup>. The virtual universal acceptance of this norm through membership of the United Nations also serves to highlight the significance of the prohibition.

30. The United Nations Charter also highlights the important role the Court has in the peaceful settlement of disputes, “the continuance of which is likely to endanger the maintenance of international peace and security” and thus undermine the Purposes of the United Nations Charter<sup>38</sup>. Article 92 of the United Nations Charter identifies the Court as the principal judicial organ of the United Nations and provides that its Statute — annexed to the United Nations Charter — is an integral part of the United Nations Charter. Article 36 (3) of the United Nations Charter provides that the Security Council “should also take into consideration that legal disputes, as a general rule, be referred by the parties to the International Court of Justice”. It is thus clear that the Court is expected, through its judicial function, to contribute to the maintenance of international peace and security. Therefore, the discharge by the Court of its judicial functions is not peripheral to, but is an integral part of the post-World War II system for the maintenance of international peace and security.

31. The law in this area should work to discipline States to refrain from unlawful behaviour. Every State presenting a claim that another State has breached Article 2 (4) of the United Nations Charter (that is not patently unmeritorious or frivolous) deserves a decision as to whether, on the basis of the relevant law and facts, that foundational provision has been breached; equally, the State against whom the claim is made needs to know whether its acts breached Article 2 (4). It is therefore the Court’s responsibility, as the “principal judicial organ of the United Nations”, to take

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<sup>37</sup>For example, in the *Paramilitaries* case, the Court noted that Art. 2 (4):

“is frequently referred to in statements by State Representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that ‘the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*’” (paragraph (1) of the Commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-11, p. 247).” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, p. 100, para. 190.)

<sup>38</sup>Art. 33 of the UN Charter.

on the sometimes difficult and sensitive task of identifying the contours of international law's prohibition of the use of force<sup>39</sup>.

32. This is a view that has been shared by former Members of the Court. In his separate opinion in *Oil Platforms*, Judge Simma found it

“regrettable that the Court has not mustered the courage of restating, and thus re-confirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency”<sup>40</sup>.

In 2005, Judge Elaraby criticized the Court's decision in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* not to rule on the Democratic Republic of Congo's claim that Uganda's acts amounted to aggression. In his view, it was part of the Court's “judicial responsibility” to determine whether Uganda's acts met the legal standard for aggression<sup>41</sup>.

In the same case, Judge Simma also wondered why the Court was not prepared to “call a spade a spade” when the Court refrained from making a finding that Uganda's military activities on Congolese territory were not only violations of Article 2 (4) of the United Nations Charter but also amounted to aggression<sup>42</sup>.

33. The use of force among States has taken new forms, and entered new arenas, since the San Francisco Conference in 1945. While the prohibition of the use of force is a bedrock principle of the international legal order, its edges are in need of further definition. It may even be worth asking whether the ambiguity still present in the contours of the prohibition of the use of force damages respect for the norm. If so, this again highlights the importance of the principal judicial organ of the United Nations clarifying the contours of that prohibition when the opportunity arises.

34. Consequently, in my view, the Court should only refrain from making an express and discrete finding on a claim that the prohibition of the use of force has been breached, if it is of the opinion that the claim is patently unmeritorious or frivolous.

#### D. INTERPRETING PARAGRAPH 97

35. In paragraph 93, the Court found that the activities carried out by Nicaragua in the disputed territory after 2010, including the excavation of three *caños* and establishing a military

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<sup>39</sup>Art. 92 of the UN Charter; *Military and Paramilitary Activities in and against Nicaragua, Judgment, Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 435, para. 96 (“It must also be remembered that, as the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 4) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force.”)

<sup>40</sup>*Oil Platforms (Islamic Republic of Iran v. United States of America), I.C.J. Reports 2003*; separate opinion of Judge Simma, pp. 327-328, para. 6.

<sup>41</sup>*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2005*; separate opinion of Judge Elaraby, p. 329, para. 9; pp. 330-331, para. 17.

<sup>42</sup>In their opinions, both judges mention the relative functions of the Security Council and the Court, and the Court's role in resolving legal questions. Yet, as the citations show, they still conclude that the Court should have been more explicit in its decisions on the use of force (in *Oil Platforms*) and an act of aggression (in *Armed Activities*). Their words are relevant in indicating a reluctance of the Court in recent times to determine certain issues relating to the use of force.



presence in part of that territory, constituted a breach of Costa Rica's territorial sovereignty. The Court further considers reparation for this breach in paragraphs 139 and 142. In paragraph 97, the Court turns to Costa Rica's claim that Nicaragua breached the prohibition of the use of force. On this claim, the Court's position is that since it had already determined the unlawful character of Nicaragua's activities, there was no need to consider any further Costa Rica's submission that those activities breached the prohibition of the use of force in Article 2 (4) of the United Nations Charter. As noted earlier, the Court followed its decision in *Cameroon v. Nigeria* where the Court finds that, "by the very fact of the present Judgment and the evacuation" of the disputed territory, the injury suffered by Costa Rica "will in all events have been sufficiently addressed" (*I.C.J. Reports 2002*, p. 452, para. 319).

36. The Court did not therefore make any discrete, express determination as to whether the prohibition of the use of force under Article 2 (4) of the United Nations Charter had been breached. But it is not at all clear that the Court has dispensed with any further consideration of Costa Rica's submissions relating to the use of force. A question arises as to the meaning of the phrase "the injury suffered by Costa Rica". The initial impression might be that the finding is confined to the injury suffered by Costa Rica as a result of the breach of its sovereignty and territorial integrity. The most relevant feature of the "Judgment as a whole" is the Court's finding that Costa Rica has sovereignty over the disputed territory, that its territorial sovereignty has been breached and the reparation awarded as a result. Yet, the Court has deemed it unnecessary to rule on submissions relating to the use of force because *any* injury suffered as a result of those allegations would, in its view, be remedied. The sweeping phrase "in all events" suggests a wider coverage and there would not seem to be any need for this broader, all-embracing phrase if "injury" were confined to a breach of sovereignty and territorial integrity. I therefore interpret the phrase "the injury suffered by Costa Rica" as encompassing any injury suffered by Costa Rica as a result of a breach of the prohibition of the use of force.

37. If that is the correct interpretation, the question that arises is, how does the Court determine the appropriate reparation for a breach of the use of force without having first examined the claim and decided that there was such a breach? The obligation to make reparation flows from a breach of an international obligation and the appropriate form and parameters of reparation are thus influenced by the *fact of* and *circumstances of* that breach<sup>43</sup>. Further, while the appropriate modality of reparation is determined by the circumstances<sup>44</sup>, satisfaction, by its very nature, relies upon some recognition of the fact of breach.

38. Moreover, can a breach of Article 2 (4) of the Charter, even if it is not the most egregious breach, but nonetheless a breach of a provision that is so fundamental to the maintenance of international peace and security and to international relations as a whole that it constitutes

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<sup>43</sup>Para. 4 to the Commentary to Art. 31 of the ILC's Draft Articles on State Responsibility 2001 states: "The general obligation of reparation is formulated in Art. 31 as the immediate corollary of a State's responsibility i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States . . ." And as was famously stated by the Permanent Court of International Justice in *Factory at Chorzów* case (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21): "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore, is the indispensable complement of a failure to apply a convention . . ."

<sup>44</sup>See, e.g., the Court's practice of a declaration of its findings as a form of satisfaction laid down in the *Corfu Channel* case:

"[T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction." (*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.)

*jus cogens*, be remedied in the manner adopted by the Court? The approach by the Court in relation to a claim that “a cornerstone of the United Nations Charter”<sup>45</sup> has been removed is, in the context of this case, somewhat summary, dismissive and indiscriminate. The last sentence of paragraph 97 is properly interpreted as referring to the Judgment as a whole and the evacuation of the disputed territory as the factors that sufficiently address the putative breach of the prohibition of the use of force. Yet the term “Judgment as a whole” is vague and imprecise. In my view, the finding that comes closest to reparation for that breach is the finding of a breach of Costa Rica’s sovereignty and territorial integrity. The paragraph also seems to proceed on the basis that, even if there is no equivalence between the two norms, their relative values are such that a breach of the prohibition of the use of force may be sufficiently remedied by what flows from a finding of a breach of sovereignty and territorial integrity. The Court’s conclusion in paragraph 97 suggests that it has engaged in a comparative exercise. However, it is a conclusion that is arrived at without any examination by the Court of the evidence relating to the use of force.

39. While the Court’s jurisprudence establishes that the norms prohibiting the use of force and requiring respect for sovereignty and territorial integrity serve distinct functions, they reflect overlapping, but not identical, concerns<sup>46</sup>. It is the element of the use of force that fundamentally distinguishes the interests protected by Article 2 (4) of the United Nations Charter from conduct that breaches sovereignty and territorial integrity *simpliciter*. What the Court has done in its finding in the last sentence of paragraph 97 requires some kind of weighing exercise leading to a conclusion as to the relative values of the prohibition of the use of force against territorial integrity and the relative values of the legal protection of sovereignty and territorial integrity. But the Judgment offers no explanation as to how this weighing exercise is carried out. In my view, a finding that a country’s territorial sovereignty is breached should not, in the context of this case, be used to provide reparation for a breach of Article 2 (4) of the United Nations Charter.

40. The consequences of a breach of the norm prohibiting the use of force will usually, or is much more likely to be far more calamitous than a breach of the norm protecting sovereignty and territorial integrity *simpliciter*; the first breach contains a greater risk of escalation posing a threat to international peace and security. The overriding concern about the use of force is that a powerful State may use it for its own advantage and selfish purposes to the detriment of the international community. This concern is well reflected in *Corfu Channel* where the Court spoke of “the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses”<sup>47</sup>. Of course, breaches of territorial integrity can lead, and have in the past led to international conflicts. But the Court was right to emphasize the very likely connection between a policy of force and consequential calamitous abuses. In that case, the Court did not accept the United Kingdom’s claim that it could, with the help of its military, enter Albanian territorial waters to secure possible evidence of Albania’s internationally wrongful conduct. Such a “right of intervention”, the Court said, “would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself”<sup>48</sup>. Similarly, and in general terms the act of a country that is militarily stronger than its neighbour claiming its neighbour’s territory and placing troops thereon might easily lead to outright military confrontation, posing a threat to international peace and security.

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<sup>45</sup>See footnote 33.

<sup>46</sup>*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 128, para. 251 (“The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention.”).

<sup>47</sup>*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.

<sup>48</sup>*Ibid.*

## **E. THE DETERMINATION OF A BREACH OF ARTICLE 2 (4) OF THE UNITED NATIONS CHARTER**

41. As alluded to earlier, while the principle is a “cornerstone”, firmly embedded in the legal order, there remains ambiguity in the parameters of what amounts to a use of force. However, guidance regarding the relevant factors to consider in determining a use of force can be drawn from the Court’s jurisprudence. An appropriate legal analysis for the prohibition of the use of force considers the *gravity* of the acts and the *purpose* that is reasonably deduced from the State’s actions and statements<sup>49</sup>.

42. In the legal analysis it is important to maintain the distinction between the rule protecting a State’s territorial sovereignty and the rule prohibiting the use of force. Article 2 (4) of the United Nations Charter prohibits the “threat or use of force against the territorial integrity . . . of any state”. The Court’s finding that Costa Rica’s territorial integrity has been breached, is, as explained above, entirely different from a finding that a State has threatened or *used force against* the territorial integrity of a State or the Purposes of the United Nations Charter in breach of Article 2 (4) of the United Nations Charter.

43. The Court’s jurisprudence establishes that the customary principle of the non-use of force and Article 2 (4) of the United Nations Charter contain a threshold of force that needs to be surpassed for the legal prohibition to be violated<sup>50</sup>. The jurisprudence also establishes that non-violent use of force is not exempted from the prohibition<sup>51</sup>. No shots need be fired, no heavy armaments need be used and certainly no one need be killed before a State can be said to have violated the prohibition. Yet, the measures need to reach a certain *gravity* and have an unlawful *purpose* before they cross the threshold and qualify as a use of force.

44. In assessing the placement of the relevant threshold for determining a use of force, I agree with commentators who argue that “in its restriction to armed or military force the prohibition must, however, be interpreted very broadly to basically capture each and every form of armed force by individual States”<sup>52</sup>. This is in keeping with both the purpose of the norm to maintain peace and security, as well as the foundational nature of the norm in the current legal order.

45. While an assessment of a State’s purpose is informed by gravity of the acts, I analyse the facts of this case, as against the two criteria, separately in the following section. This opinion argues that the gravity and the purposes of Nicaragua’s activities attain the level of force prohibited by Article 2 (4) of the United Nations Charter and the customary principle of the non-use of force.

### **(i) The gravity of Nicaragua’s actions**

46. Article 2 (4) of the United Nations Charter prohibits the “threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent

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<sup>49</sup>For an analysis of examples drawn from the Court’s jurisprudence, see Olivier Corten, *The Law Against War* (Hart, 2010), particularly pp. 73 *et seq.*

<sup>50</sup>*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.

<sup>51</sup>*Ibid.*, p. 35.

<sup>52</sup>Oliver Dörr, *Use of Force, Prohibition Of*, Max Planck Encyclopedia of Public International Law, June 2011, para. 13.

with the Purposes of the United Nations”. The greater the use of force compromises the elements of statehood or the purposes of the United Nations, the graver is the breach of that norm.

47. In determining the applicability of gravity as a criterion for the unlawfulness of the use of force under Article 2 (4) of the United Nations Charter, it is helpful to advert to the 1974 United Nations resolution on the Definition of Aggression (XXIX). The Preamble to the 1974 resolution characterized aggression as the “most serious and dangerous form of the illegal use of force”<sup>53</sup>. Article 2 of the Definition provides that a determination that an act of aggression has been committed would not be justified if “the acts concerned or their consequences are not of sufficient gravity”. A certain gravity therefore determines, not only the existence of the use of force, but also the classification of that use of force.

48. Similarly, in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), the Court considered the criterion of gravity to distinguish between an “armed attack” and a “mere frontier incident”<sup>54</sup>. It classified armed attack as the “most grave” form of the use of force, but referred to “other less grave forms” of the use of force<sup>55</sup>, noting that an armed attack differed from other forms of the use of force in terms of scale and effect. In considering what constituted an “armed attack”, the Court drew upon the Definition of Aggression in Article 3 (g) of resolution XXIX<sup>56</sup>.

49. Assessing gravity is a case-by-case exercise, requiring the consideration of such factors as, for example, location of the use of force, the state of relations between the parties at the time, and other contextual factors, etc. As was emphasized in the Court’s Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the prohibition of the use of force applies “regardless of the weapons employed”<sup>57</sup>. The suggestion is that a consideration of effect — and intended effect — are relevant to a consideration of gravity, including (as noted in *Nicaragua* and quoted above) for the characterization of the type of the use of force.

50. In this case, the factor that most clearly establishes gravity is the prolonged presence of military camps and personnel on Costa Rican territory — eleven weeks in 2010 to 2011 and nine months in 2013<sup>58</sup>. The evidence before the Court clearly establishes that both the camp close to the first *caño* and the camp on the beach were manned by regular Nicaraguan military personnel, not by the Nicaraguan police<sup>59</sup>. Generally, a country’s regular military personnel is seen as a greater coercive threat than its police force. This military presence is a use of force “against the territorial integrity” of Costa Rica, exactly the conduct prohibited by Article 2 (4) of the United Nations Charter.

51. In the United Nations General Assembly resolution 2625 (XXV) entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations” (the Friendly Relations Declaration), which

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<sup>53</sup>Fifth preambular paragraph of the UN General Assembly resolution 3314 (1974).

<sup>54</sup>*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Merits, Judgment*, *I.C.J. Reports 1986*, p. 103, para. 195.

<sup>55</sup>*Ibid.*, p. 101, para. 191.

<sup>56</sup>*Ibid.*, p. 103, para. 195.

<sup>57</sup>*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996 (I)*, p. 244, para. 39.

<sup>58</sup>*Supra* at paras. 22, 23.

<sup>59</sup>*Supra* at para. 19.

reflects customary international law<sup>60</sup>, the General Assembly reiterated every State's duty "to refrain from the threat or use of force to *violate the existing international boundaries of another State* or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States" (emphasis added). In the present case, the Nicaraguan military was used to "violate the existing international boundaries" of Costa Rica. The Court's Judgment implicitly recognizes that the boundaries established by today's Judgment were those set by the 1858 Treaty of Limits, as interpreted by the relevant Awards. Equally, given that the location of the boundary was subject to a case before the Court, to the extent that Nicaragua's use of force may be seen "as a means of solving international disputes", it will violate the customary norm reflected in this duty.

52. Another index of the gravity of Nicaragua's use of force is the pointing of weapons, including what appears to be an anti-aircraft type missile at the Costa Rican aircraft on 1 November 2010<sup>61</sup>. In the context of a State's military force already being stationed on another State's territory without the latter's consent, the pointing of weapons is probative of a use of force. It is a signal of its willingness to shoot when it considers that to be necessary.

53. In conclusion, the facts before the Court establish that Nicaragua's actions were of sufficient gravity to warrant the application of Article 2 (4) of the United Nations Charter and the customary principle of the non-use of force provided they are accompanied by the requisite purpose. It is to that question that the opinion now turns.

#### **(ii) Purpose**

54. The second aspect of the analysis for an alleged breach of the prohibition of the use of force is concerned with the purpose reasonably deduced from a State's actions, including their gravity, as well as statements made by the State and the relevant context.

55. The first argument for the requirement of purpose is textual. Article 2 (4) of the United Nations Charter prohibits the use of force "*against*" the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations. It is the ordinary meaning of the word "*against*" that clearly indicates the purposive element in the Charter's prohibition of the use of force. Absent this element, there is no breach. The Concise Oxford Dictionary gives the meaning of "against" as "in opposition to" or "to the disadvantage of". Put in more practical terms, the central question is whether a reasonable interpretation of the evidence is that the purpose of the acts of the State in question is to change the outcome of a matter with another State by using force. In considering this qualification, it must be noted that the drafters of the United Nations Charter did not intend to restrict the scope of the prohibition by the specific mention of territorial integrity or political independence, but rather to emphasize their protection<sup>62</sup>.

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<sup>60</sup>*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 101-103, paras. 191-193; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 80.

<sup>61</sup>MCR, pp. 74-75, para. 3.19.

<sup>62</sup>Oliver Dörr, Albrecht Randelzhofer, Chapter I, Purposes and Principles, Art. 2 (4), *The Charter of the United Nations: A Commentary*, Vol. I (3rd ed.), Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds), Nikolai Wessendorf, (Assistant Editor), Oxford University Press, 2012, pp. 215-216.

56. When considering whether a State's actions violate the prohibition of the use of force, it is important to remember that: "[t]he essential feature which characterizes the prohibition of the use of force is the application of military forces as a means of coercion . . ." <sup>63</sup>. In this regard, I note that the regular military forces of a State exist because of their coercive abilities. An army is the symbol of a State's coercive power, and, absent consent, it will be a rare incident when the sending of its military forces by one State to another does not evidence a coercive purpose.

57. In the first case to come before the Court, *Corfu Channel*, the Court was presented with allegations that the United Kingdom had violated the prohibition of the use of force. The situation in this case did not, in the Court's view, meet the threshold:

"[The Court] does not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania. The responsible naval commander, who kept his ships at a distance from the coast, cannot be reproached for having employed an important covering force in a region where twice within a few months his ships had been the object of serious outrages." <sup>64</sup>

In its determination, the Court considered the evidence in light of the *purpose* of the "demonstration of force" by the British Navy.

58. The Court's case law considering allegations of an armed attack also establishes that an appreciation of a State's purpose is relevant to the test for this form of the use of force. In *Oil Platforms (Islamic Republic of Iran v. United States of America)* the Court, in the context of analysing whether certain actions, allegedly attributable to Iran, would constitute an armed attack, explicitly considered relevant the intention and purpose that could be deduced from the actions. It said:

"On the hypothesis that all the incidents complained of are to be attributed to Iran, and thus setting aside the question, examined above, of attribution to Iran of the specific attack on the *Sea Isle City*, the question is whether that attack, either in itself or in combination with the rest of the 'series of . . . attacks' cited by the United States can be categorized as an 'armed attack' on the United States justifying self-defence. The Court notes first that the *Sea Isle City* was in Kuwaiti waters at the time of the attack on it, and that a Silkworm missile fired from (it is alleged) more than 100 km away *could not have been aimed at the specific vessel*, but simply programmed to hit some target in Kuwaiti waters. Secondly, the *Texaco Caribbean*, whatever its ownership, was not flying a United States flag, *so that an attack on the vessel is not in itself to be equated with an attack on that State*. As regards the alleged firing on United States helicopters from Iranian gunboats and from the Reshadat oil platform, no persuasive evidence has been supplied to support this allegation. There is no evidence that the minelaying alleged to have been carried out by the *Iran Ajr*, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the *Bridgeton* was laid with *the specific intention of harming that ship, or other United States vessels*. Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and*

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<sup>63</sup>Oliver Dörr, *Use of Force, Prohibition Of*, Max Planck Encyclopedia of Public International Law, June 2011, para. 18.

<sup>64</sup>*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35.

*Paramilitary Activities in and against Nicaragua*, qualified as a ‘most grave’ form of the use of force . . .”<sup>65</sup> (Emphasis added.)

59. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court considered that the “possible motivations” driving a State’s use of force may be relevant for a finding of an armed attack. It said:

“Turning to Honduras and Costa Rica, the Court has also stated . . . that it should find established that certain transborder incursions into the territory of those two States, in 1982, 1983 and 1984, were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of these incursions or their *possible motivations*, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an ‘armed attack’ by Nicaragua on either or both States.”<sup>66</sup> (Emphasis added.)

60. The logic that makes a purposive analysis relevant for finding an armed attack for the purposes of Article 51 of the United Nations Charter applies equally to finding a use of force unlawful for purposes of Article 2 (4) of the United Nations Charter. While the use of force may often engage the international responsibility of a State, the United Nations Charter itself recognizes that it may at times be lawful. Articles 42 and 51 of the United Nations Charter are to that effect. The end to which force will be used, both in the context of Article 2 (4) and 51 of the United Nations Charter, is therefore crucial in determining its legal status; the inquiry into the pursued end is nothing other than an analysis to discern the purpose of the facts.

61. In this case, the question is whether the placement of Nicaraguan military presence on the disputed territory can reasonably be interpreted as action *against* Costa Rica in the sense that it was aimed at compromising its territorial integrity and political independence. Several pieces of evidence lead to the conclusion that the long and repeated presence of Nicaraguan military personnel on Costa Rican territory warrants that interpretation; it evidences the purpose of a State policy of the use of force against Costa Rica.

62. The first item of evidence is the existence of a territorial dispute between the Parties as soon as Costa Rica’s Government noticed the Nicaraguan military presence and made its objections thereto known<sup>67</sup>. From 1 November 2010, Nicaragua was therefore on notice of Costa Rica’s position, and any presence beyond that date is to be seen as an action *against* the principal elements of statehood of that country — its territorial integrity and political independence.

The second factor is the general history of hostilities and tense relationship between the two States<sup>68</sup>. When the evidence before the Court is examined in the context of that history, it is reasonable to see the incursions as acts *against*, that is, designed to compromise the principal elements of statehood of Costa Rica.

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<sup>65</sup>*Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, pp. 191-192, para. 64.

<sup>66</sup>*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 119-120, para. 231.

<sup>67</sup>*Supra* at para. 13.

<sup>68</sup>*Supra* at para. 12.

Third, Nicaragua's initial refusal to withdraw the troops, both in response to Costa Rica's Diplomatic Note and later, to the OAS Resolution, also show the confrontational, if not hostile, use of its military presence and purpose to stand its ground.

Fourth, it is relevant that Nicaragua chose to increase its military presence near the first *caño* after Costa Rica had communicated its objections; this is reasonably interpreted as a signal of that State's readiness to apply force, whenever Nicaragua considered it necessary<sup>69</sup>.

Relatedly, and fifth, the establishment of a second camp in a different location at a later stage again indicates a hardening of Nicaragua's position and is evidence of its purpose to defend the stance taken by force if it considered that course necessary<sup>70</sup>.

Sixth is the fact that both camps were established next to the *caño*-digging operations and therefore reasonably to be interpreted as protecting another Nicaraguan policy directed *against* Costa Rica's sovereign interests.

Seventh, Nicaragua was using regular military forces, rather than irregular, unidentifiable personnel, or police forces. The signalling effect of using regular forces, which in general have a greater coercive potential than police forces, is also to be seen not merely as confrontational, but as evidence of its aim to challenge Costa Rica's sovereign rights, by using force, if it considered that course necessary.

Eighth, the second Nicaraguan military camp was on the disputed territory in breach of the Court's Provisional Measures Order of 8 March 2011<sup>71</sup>. This is an act of defiance which goes to the State's purpose and is to be contrasted with the situation at issue in *Land and Maritime Boundary (Cameroon v. Nigeria)* on which the Court relies but in which Nigeria's military presence at the time of the proceedings was not in contravention of an order by the Court<sup>72</sup>. This brazen violation of the Court's order is perhaps the greatest indication of the unlawful aim behind Nicaragua's actions, showing as it does, that Nicaragua was prepared to go as far as breaching an Order of the principal judicial organ of the United Nations in order to maintain its claim to the disputed territory.

## G. CONCLUSION

63. The foregoing analysis leads to the conclusion that Nicaragua's activities were accompanied by the requisite gravity and purpose to warrant a finding of the use of force in breach of Article 2 (4) of the United Nations Charter. It is for this reason that I am unable to join the Court with respect to its conclusion in paragraph 229 (7).

64. One has to guard against the possibility that the Court's approach in this Judgment, together with the position it took in *Land and Maritime Boundary (Cameroon v. Nigeria)* could be seen as developing a line of jurisprudence in which it abstains from ruling on the merits of claims of breaches of Article 2 (4) of the United Nations Charter in instances where the acts complained of take place (at least in large part) on disputed territory. In that regard, one notes and welcomes the salutary warning given by the Court that "the fact that Nicaragua considered that its activities were

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<sup>69</sup>*Supra* at para. 18.

<sup>70</sup>*Supra* at paras. 22-24.

<sup>71</sup>*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, p. 27, para. 86 (1) ("Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security").

<sup>72</sup>*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 451, paras. 312 and 314; and p. 457, para. 325 (V) (A).



taking place on its own territory does not exclude the possibility of characterizing them as an unlawful use of force<sup>73</sup>. If indeed a line of jurisprudence is developing in which the Court abstains from ruling on the merits of claims of the use of force in a disputed territory, this course is to be regretted. Disputed territories are one of the most sensitive categories of international relations and particularly prone to provoking the use of force by States. A judicial practice of ruling on the merits of every claim by a State that another State has breached Article 2 (4) of the United Nations Charter would be entirely consistent with, and supportive of the system established after World War II for the maintenance of international peace and security and the Court's role in that system. Both Applicant and Respondent will learn valuable lessons for their future conduct from the Court's ruling. Indeed, the international community as a whole will profit from this judicial practice. It is reiterated that the argument is not that the Court must rule on the merits of every claim made by a State, but rather that the centrality of Article 2 (4) of the Charter in modern international relations requires the Court to determine the merits of a claim of a breach of the prohibition of the use of force, unless it is patently unmeritorious or frivolous.

65. Nothing in this opinion is to be seen as taking a position that devalues the legal prohibition of the use of force or as taking the proverbial sledgehammer to kill a flea. International law has a spectrum of activities that may breach Article 2 (4) of the United Nations Charter at its higher, middle and lower reaches; some of the activities at the higher reaches may amount to aggression, "the most serious and dangerous form of illegal use of force"<sup>74</sup>; others may constitute an armed attack giving rise to self-defence. Activities at the middle and lower reaches may also breach Article 2 (4) of the United Nations Charter if they are accompanied by the requisite gravity and purpose; such activities may very well be what the Court had in mind in *Paramilitary Activities* when it referred to "other less grave forms of the use of force"<sup>75</sup>. The presence of gradations in the law relating to the use of force responds to the concern that a finding that activities at the middle or lower end of the spectrum, if accompanied by the requisite gravity and purpose, constitute a breach of Article 2 (4) of the United Nations Charter, would somehow discredit the seriousness of the international obligations involved.

66. In order to determine the rules applicable to those "less grave forms of the use of force" the Court, after emphasizing the customary status of the Friendly Relations Declaration, went on to cite a number of duties set out in the Declaration. Included in the Court's list, as already stated<sup>76</sup>, is "the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and concerning frontiers of States". It is precisely this duty that Nicaragua breached when it placed its soldiers on Costa Rican territory.

67. In my view, a State placing members of its military force on the territory of another State on two occasions for a combined period of about one year over a three-year period is a breach of the norm prohibiting the use of force. These activities by Nicaragua certainly cannot be characterized as a "mere frontier incident" of the kind referred to by the Court in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*<sup>77</sup>. The presence of a military force for such a long period without the consent of the other State constitutes, by itself, a breach of Article 2 (4) of the United Nations Charter. This action could

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<sup>73</sup>See paragraph 97 of the Judgment.

<sup>74</sup>RC/Res 6, Ann. III, Understanding No. 6.

<sup>75</sup>See footnote 55.

<sup>76</sup>*Supra* at para. 51.

<sup>77</sup>*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 103, para. 195.*

certainly have led to a military conflict between Nicaragua and Costa Rica and posed a threat to international peace and security, warranting the intervention of the Security Council, had Costa Rica not exercised commendable restraint and chosen to have recourse to the Court rather than to respond in kind. Nicaragua by its military presence excluded Costa Rica from its own territory by staking a claim to territory that had been determined from 1858 in the Treaty of Limits to be Costa Rican, and which Nicaragua had never claimed as its own until 26 November 2010 after Costa Rica had filed its Application before the Court on 18 November 2010. While not at the higher reaches of the spectrum, Nicaragua's acts are certainly not at the lower end; they are somewhere in between. Arguably, the prolonged presence of Nicaragua's forces on Costa Rican territory signifies that Nicaragua's acts are not at the lower end of the spectrum.

68. In my view, since the affront to Costa Rica is aggravated by the prolonged Nicaraguan military presence on Costa Rican territory, particularly so in the nine-month period after the Court ordered Nicaragua to remove its soldiers, it would be appropriate to consider an apology as satisfaction.

69. It is not clear from the evidence how many soldiers were actually placed by Nicaragua in the disputed territory. What is certain, however, is that the military presence was sufficiently substantial to have been described by Costa Rica and acknowledged by Nicaragua as "a military encampment"<sup>78</sup> and notably, in its Order for provisional measures of 22 November 2013, the Court found that the photograph dated 5 February 2015 did show a "Nicaraguan army encampment"<sup>79</sup>. The fact that the Nicaraguan force may not have been constituted by a very large number of soldiers does not in any way detract from the characterization of Nicaragua's conduct as an unlawful use of force in contravention of Article 2 (4) of the Charter. Generally, the size of a military force deployed will depend upon a variety of factors, including the purpose of the deployment, the characteristics of the particular location and a State's military capability, including the number of troops at its disposal.

70. It is recalled that while the means employed in using force is relevant in determining gravity and therefore, lawfulness, it is not conclusive; the effect of the means must also be considered. In this case, the number of soldiers deployed by Nicaragua was sufficient to achieve its unlawful ends: it was able to remain on Costa Rican territory for a period of about one year over a three-year period in order to further its policy.

71. The years since the adoption of the United Nations Charter have only served to re-emphasize the importance to the international legal order, of Article 2 (4) and its customary equivalent. The Court should play its role in upholding and applying the prohibition, adjudicating claims that the norm has been breached, unless the claim is patently unmeritorious or frivolous.

(Signed) Patrick ROBINSON.

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<sup>78</sup>Paragraph 125 of the Judgment.

<sup>79</sup>See para. 24 and footnote 32 of this opinion.